In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1494

TUSCANY FABRICS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CUSTOMS AND PATENT APPEALS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner imports woven fabric used to make ladies' coats. The fabric is composed by weight of 70 percent reprocessed wool, 22 percent nylon, and 8 percent asbestos. The Bureau of Customs classified the merchandise under Item 336.50 of the Tariff Schedules of the United States (TSUS) as "[w]oven fabrics, of wool" valued at not more than $1.26 2/3

per pound, and assessed it with duty at 37.5¢ per pound plus 60 percent *ad valorem*.

Petitioner claimed in the Customs Court that the merchandise should have been classified under Item 518.21 as "cloth * * * of asbestos, or of asbestos and any other spinnable fiber," dutiable at 6 percent *ad valorem*. The Customs Court upheld the classification and rejected petitioner's argument that parts of the TSUS are unconstitutional. It ruled that classification under Item 518.21 is appropriate only where cloth contains asbestos in sufficient amount "to impart its peculiar characteristics or properties" to the merchandise (Pet. App. 8a). The court found on the extensive record that the asbestos content was insufficient to impart its peculiar properties to petitioner's fabric (Pet. App. 19a). The Court of Customs and Patent Appeals affirmed (Pet. App. 22a-31a).

Petitioner here advances three contentions: first, headnote 7 to schedule 3 of the TSUS [1] violates petitioner's right to due process under the Fifth Amendment because it was enacted as a rider to a bill which contained more than one subject and the title of which did not fully express the subjects covered;

[1] The headnote, upon which the courts below relied in part for their construction of the statute, provides that, for portions of schedule 3, provisions for fabrics in chief value of wool shall apply also to fabrics in chief weight of wool. In the absence of this headnote, general headnote 9 would limit the phrase "woven fabrics, of wool," to fabrics in chief value of wool; petitioner has alleged that its fabric is in chief value of asbestos.

second, headnote 1(ii) of schedule 3[2] also violates petitioner's rights because it is too vague and indefinite; and third, the petitioner's fabric should in any event be classified under schedule 5 rather than schedule 3. The courts below properly rejected each of these contentions, and none of them warrants further review.

1. Petitioner concedes that the Constitution neither limits Congress to a single subject in each bill nor requires that the title reflect the subjects covered. The argument is, rather, that because a majority of the states have such provisions in their constitutions, the due process clause of the Fifth Amendment must be read to impose upon Congress both the single-subject rule and the title rule. Petitioner cites no support for this assertion, and what little authority there is contradicts it.[3]

Though this Court is hardly a stranger to the single-subject and title rules embodied in state constitutions,[4] it has never hinted that those rules must be

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[2] This headnote, also relied upon by the courts below, provides that schedule 3 does not cover "articles containing asbestos in significant amounts, *i.e.*, articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the article (see part 1F of Schedule 5)."

[3] *Chase Nat. Bank* v. *Mobile & O.R. Co.*, 30 F. Supp. 565, 568 (S.D. Ala.); *United States* v. *Lord*, 10 Alaska 626, 632.

[4] There have since at least 1874 been numerous challenges to state or territorial legislation based on an asserted violation of such rules. *Woodson* v. *Murdock*, 22 Wall. 351; *San Antonio* v. *Mehaffy*, 86 U.S. 312; *Unity* v. *Burrage*, 103 U.S. 447; *Louis-*

applied to Congress through the Fifth Amendment. It has, instead, recognized that legislative bodies not subject to such express constitutional provisions commonly engage in the practice of including in a bill more than one subject as well as matters unrelated to the title. *Louisiana* v. *Pilsbury*, 105 U.S. 278, 289; see also *United States* v. *Union Pac. R.R. Co.*, 91 U.S. 72, 82; *Hadden* v. *The Collector*, 5 Wall. 107, 110. Even with respect to legislatures that are bound by the single-subject and title rules, the Court has established the following principle:

> [A]s freedom required or convenient for the effective exertion of the legislative power ought not unnecessarily or lightly to be interfered with, the courts * * * hold that, in order to warrant the setting aside of enactments for failure to

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iana v. *Pilsbury*, 105 U.S. 278; *Montclair* v. *Ramsdell*, 107 U.S. 147; *Read* v. *Plattsmouth*, 107 U.S. 568; *Jonesboro City* v. *Cairo & St. L.R.R. Co.*, 110 U.S. 192; *Otoe County* v. *Baldwin*, 111 U.S. 1; *Ackley School District* v. *Hall*, 113 U.S. 135; *Mahomet* v. *Quackenbush*, 117 U.S. 508; *Carter County* v. *Sinton*, 120 U.S. 517; *Hoboken* v. *Pennsylvania R.R. Co.*, 124 U.S. 656; *Detroit* v. *Detroit Citizens' Street Ry. Co.*, 184 U.S. 368; *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U.S. 197; *Ross* v. *Aguirre*, 191 U.S. 60; *Blair* v. *Chicago*, 201 U.S. 400; *Peters* v. *Broward*, 222 U.S. 483; *Citizens' Telephone Co.* v. *Fuller*, 229 U.S. 322; *Christianson* v. *King County*, 239 U.S. 356; *Merrick* v. *N. W. Halsey & Co.*, 242 U.S. 568; *Van Dyke* v. *Geary*, 244 U.S. 39; *Posados* v. *Warner, Barnes & Co.*, 279 U.S. 340; *International Shoe Co.* v. *Shartel*, 279 U.S. 429; *Utah Power & Light Co.* v. *Pfost*, 286 U.S. 165.

Only once has the Court sustained such a challenge, and then only because the state's highest court had authoritatively construed the constitutional rules to invalidate a nearly identical statute. *Peters* v. *Broward*, 222 U.S. 483.

> comply with the rule, the violation must be substantial and plain. [*Posados* v. *Warner, Barnes & Co.*, 279 U.S. 340, 344.]

The basis of this restraint—the "freedom required * * * for the effective exertion of the legislative power"—also supports our view that there is no occasion now to condemn as violative of due process the legislative practices engaged in by the Congress since its inception.

2. Petitioner attacks as void for vagueness the following language of headnote 1(ii): "articles containing asbestos in significant amounts, *i.e.*, articles in which asbestos is used in sufficient amounts to impart its peculiar characteristics or properties to the article." Even if it be assumed that the "void for vagueness" doctrine is applicable to the TSUS—that is, in a non-penal context where conduct is neither required nor forbidden [5]—the headnote is not unconstitutionally vague. Whether in a given case asbestos has been used in sufficient amounts to im-

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[5] See, *e.g.*, *Baggett* v. *Bullitt*, 377 U.S. 360, 366-367. The Court in *Boutilier* v. *Immigration & Naturalization Service*, 387 U.S. 118, 123, held that the "void for vagueness" doctrine is applicable in civil actions only where there has been an "exaction of obedience to a rule or standard" which "strip[s] a participant of his rights." Here, as in *Boutilier*, the challenged headnote "imposes neither regulation of nor sanction for conduct." At least arguably, therefore, "no necessity exists for guidance so that one may avoid the applicability of the law." (*Id.*) The *Boutilier* holding that the doctrine is inapplicable to standards for admission of aliens suggests strongly that it is inapplicable as well to the terms for the entrance of merchandise.

part its peculiar properties to the article is a question of fact to be decided on the basis of the available evidence and subject to judicial review. One who wishes to challenge such a finding is not left in doubt as to what he must demonstrate.[6] As the Customs Court stated (Pet. App. 12a):

> Persons dealing with articles composed in part of asbestos can be assumed to know what the characteristics of asbestos are and whether a particular article has any of those characteristics. Thus, they are in a position to apply the standard or, where it is claimed that customs officials have misapplied it, to establish that the asbestos in the imported article has in fact imparted its peculiar characteristics or properties thereto.

The critical terms therefore do establish a "legally fixed standard," cf. *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 403; they are "susceptible of objective measurement," cf. *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286; and they do give "fair warning" to importers, cf. *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 740.

3. With respect to the construction of the pertinent provisions of the TSUS, we rely upon the opinions below, which took proper account of the clear congressional intent to preclude circumvention of the

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[6] The petitioner here, for example, presented substantial expert testimony, carefully considered by the Customs Court (Pet. App. 13a-20a), concerning the properties of asbestos and the effects of combining asbestos with wool.

tariffs for wool fabrics by the simple expedient of adding small amounts of some high-value fiber (see Pet. App. 8a-9a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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